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No. 04-870

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOAN HALL, *et al.*,

Petitioners

v.

COMMONWEALTH OF VIRGINIA, *et al.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents concede that this Court has never decided specifically whether minority plaintiffs are prohibited from bringing a claim under Section 2 of the Voting Rights Act ("Act"), 42 U.S.C. § 1973(b), when they allege they have the ability to "elect representatives of their own choice" in a single-member district, but do not allege their minority group constitutes an arithmetical majority in the district. IR Br. in Opp. at 5; CR Br. in Opp. at 13-15.[1] While asserting that most courts have barred "ability-to-elect" district claims under Section 2, Respondents concede that some Circuit and district courts have permitted such claims. IR Br. in Opp. at 10; CR Br. in Opp. at 19. They also concede that the United States' most recent brief on this issue to this Court recommended that the Court grant review to settle this dispute. IR Br. in Opp. at 15. These concessions justify a grant of review.

Respondents argue that *certiorari* should be denied because "overwhelming precedent" dooms "influence district" claims. But as the Fourth Circuit recognized below, Petitioners have alleged an ability-to-elect district claim, not an influence district claim. Respondents' statutory arguments fail to address this Court's broad construction of the term "elect" in Section 2, which comports with the totality of the circumstances inquiry mandated by Congress. And permitting ability-to-elect claims will remedy actual vote dilution that hurts minority voters.

The Court should grant review to resolve this important issue that will affect voting districts nationwide.

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[1] "IR Br. in Opp." is the opposition brief filed by the individual Respondents. "CR Br. in Opp." is the opposition brief filed by the Commonwealth Respondents.

A. There Is An Ongoing Circuit And District Court Split Whether Ability-To-Elect Claims – Which Are Different Than Influence District Claims – Are Prohibited Under Section 2.

1. If Petitioners' case had arisen in Rhode Island, it would have been decided on its merits. The First Circuit would not have affirmed a Federal Rule of Civil Procedure 12(b)(6) dismissal of Petitioners' ability-to-elect claim by the lower court, as the Fourth Circuit did. Instead, it would have permitted the case to advance into discovery. *Metts v. Murphy*, 363 F.3d 8 (1st Cir. 2004) (*en banc*). Respondents argue that *Metts* was wrongly decided and that the Fourth Circuit was correct in dismissing Petitioners' claim. IR Br. in Opp. at 10, 22, 24; CR. Br. in Opp. at 20 n.8. Respondents hence implicitly acknowledge a Circuit split on whether Section 2 bars ability-to-elect district claims.[2]

Respondents' attempt to sweep away all the district court cases that favor ability-to-elect district claims, *see* IR Br. in Opp. at 9, CR Br. in Opp. at 19 n.7, fails to address the core teaching of these cases: that a mechanical 50% cutoff to determine whether a minority group has the ability to elect is inappropriate, given the fact-intensive inquiry required by Section 2. Petition at 14-15. Petitioners readily admit that other district court cases have rejected ability-to-elect district claims. *Id.* at 14-16. These splits in reasoning among Circuit and district courts are why the Court should grant review.

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[2] Contrary to Respondents' contention, IR Br. in Opp. at 7, neither the Ninth Circuit nor the Eleventh Circuit has ruled that Section 2 bars all ability-to-elect claims. The Ninth Circuit has stated in dictum that when candidates are elected by a plurality, an ability-to-elect claim might be cognizable. *See Romero v. City of Pomona*, 883 F.2d 1418, 1424 n.7 (9th Cir. 1989). The Eleventh Circuit has explicitly left the issue open: "We leave open the question of whether a section 2 plaintiff can pursue a 'coalition' or 'crossover' dilution claim, i.e. a claim where members of the minority group are not a majority of the relevant voting population but nonetheless have the ability to elect representatives of their choice with support from a limited but reliable white crossover vote." *Dillard v. Baldwin County Comm'rs*, 376 F.3d 1260, 1269 n.7 (11th Cir. 2004) (internal quotation marks, citation omitted).

2. Respondents claim "the Court should not attach talismanic significance to whether Petitioners' claim is labeled with the 'influence' or 'ability-to-elect' terminology." IR Br. in Opp. at 5 n.2. But *Georgia v. Ashcroft*, 539 U.S. 461 (2003), drew just this distinction between ability-to-elect/"coalitional" districts and influence districts. *Id.* at 480 (majority op.), 492-93 (Souter, J., dissenting); *see* Petition at 4 n.4. And the Fourth Circuit analyzed Petitioners' claim as an ability-to-elect claim below, stating that "[b]ecause the complaint does not raise an influence dilution claim, we do not consider the question here." App. at 11a n.11.

The two types of claims are different. An influence district claim asserts that the minority group can only influence election results, not elect its candidate of choice. By contrast, an ability-to-elect district claim requires plaintiffs first to allege, and then to prove, that they have the power to elect their candidate of choice. Petition at 4 n.4. Whether or not the Act protects the ability of a minority group to influence elections, the Act is plainly designed to clear obstacles that hinder minority groups which otherwise would have the power to elect. Ability-to-elect district claims fall squarely within the scope of Section 2 and *Thornburg v. Gingles*, 478 U.S. 30 (1986). Respondents wrongly conflate these two types of claims.[3]

Accordingly, Respondents' claim that "overwhelming precedent" weighs against granting review, *see* IR Br. in Opp. at 6-9, is incorrect, since most of the cases they cite concern influence district claims.[4] Other cases they cite do not explicitly discuss ability-to-elect district claims and

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[3] Respondents assert that ability-to-elect district claims are "less viable" than influence district claims. IR Br. in Opp. at 5 n.2. But *Gingles* and later cases decided by this Court explicitly reserve whether Section 2 bars ability-to-elect district claims. Petition at 10-12.

[4] Also not at issue are "minority coalition" claims, where two different minority groups are combined for purposes of *Gingles*' first prong. *See Growe v. Emison*, 507 U.S. 25, 41 (1993); *Nixon v. Kent County*, 76 F.3d 1381, 1389 (6th Cir. 1996) (*en banc*). Petitioners allege that they have the ability to elect their candidate of choice without help from another minority group. App. at 50a.

thus have little or no precedential value. *See Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993).

3. The United States stated in its most recent submission to the Court on this issue that:

> [t]he application of the 50% rule by the court of appeals, moreover, raises a recurring issue of considerable importance to the administration of Section 2. The question whether Section 2 plaintiffs claiming vote dilution must invariably show that the minority would constitute a majority of a single-member district has been raised, and continues to be raised, in numerous cases and should be definitively resolved by this Court.

Brief for the United States as *Amicus Curiae*, *Valdespino v. Alamo Heights Ind. Sch. Dist.*, No. 98-1987 (Dec. 17, 1999) ("*Valdespino* Amicus Brief"), at 14. Five years have passed since the Court denied *certiorari* in *Valdespino*, and the United States has been proven right: the issue has arisen in more and more cases, and courts have rendered conflicting decisions whether Section 2 bars ability-to-elect district claims. *See* Petition at 17. The Court should address this issue now.

B. Respondents' Interpretation Of Section 2 Is At Odds With The Statute's Plain Meaning And This Court's Cases.

1. Respondents disparage ability-to-elect district claims using the following thread of reasoning: less-than-50% minority groups lack the power to "elect" under Section 2; that means ability-to-elect district claims must necessarily protect biracial coalitions joined only by politics, not minority groups; and since Section 2 only protects minority groups, no ability-to-elect district claims are possible. IR Br. in Opp. at 16-19. But this thread unravels almost immediately because this Court has already stated that less-than-50% minority groups have the power to "elect" under Section 2. That implies strongly that ability-to-elect district claims are permitted under Section 2.

For instance, in *Georgia* – a case ignored by Respondents when they construe Section 2 – both the majority and dissenting opinions state that minority voters can possess the ability to "elect" candidates of their choice, even if they do not constitute a majority in that district. 539 U.S. at 480 (majority op.), 492-93 (Souter, J., dissenting). Other Supreme Court cases are in accord.[5] Petition at 20 (citing cases). The United States also recognizes that less-than-50% minority groups can have the power to elect candidates of their choice. *Valdespino* Amicus Br., *supra*, at 10-11.[6] And district courts have found that less-than-50% minority groups can be often an "effective majority." *See, e.g., Martinez v. Bush*, 234 F. Supp. 2d 1275, 1302, 1307, 1315, 1322 (S.D. Fla. 2002) (Congressional districts with greater than a 46% African-American voting age population, and a state house district with a 42% African-American voting age population, afforded African-American voters a reasonable opportunity to elect candidates of choice).

Respondents argue that an over-50% rule is necessary to ensure minority group members can "dictate [electoral] outcomes independently." IR Br. in Opp. at 17 (quoting *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993)). But "dictating [electoral] outcomes independently" is not the standard for the first *Gingles* prong; rather, the standard is whether the minority group – of whatever size – has the "ability to elect." *See Voinovich*, 507 U.S. at 158; *Gingles*,

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[5] Respondents badly misread Justice O'Connor's concurrence in *Gingles*. IR Br. in Opp. at 25-26. Her initial criticism of the standard created by the *Gingles* majority has been superseded by the Court's repeated approvals of *Gingles*. *See, e.g., Voinovich v. Quilter*, 507 U.S. 146 (1993); *Johnson v. De Grandy*, 512 U.S. 997 (1994). This, however, does not diminish the force of her observation that under the *Gingles* majority opinion, a minority group which does not constitute an arithmetical majority in a district nonetheless may have the ability to "elect" candidates of its choice. *Gingles*, 478 U.S. at 90 n.1 (O'Connor, J., concurring); *see* Petition at 10.

[6] Respondents inexplicably assert that the Court's denial of certiorari in *Valdespino* has significance. *See* IR Br. in Opp. at 15. It is settled law that "[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923).

478 U.S. at 46 n.12 (majority op.), 90 n.1 (O'Connor, J., concurring). The sentence in *Voinovich* that follows the above-quoted excerpt confirms this: "*But* [*African-American voters*] *could elect their candidate of choice* nonetheless if they are numerous enough and their candidate attracts sufficient cross-over voters from white voters." *Voinovich*, 507 U.S. at 154 (emphasis added).[7]

Respondents would throw Section 2 vote dilution plaintiffs out of court without any opportunity to present evidence if the minority group constituted 49.9% of the relevant population in an illustrative district, even if it could demonstrate that it had the power to elect (with or without white crossover voters). This Procrustean approach is contrary to the fact-specific inquiry mandated by Section 2 and embraced by this Court. *See Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994) ("No single statistic provides courts with a shortcut to determine whether a [redistricting plan] unlawfully dilutes minority voting strength.").

2. Respondents claim that for ability-to-elect district claims, district courts will be unable to determine "which of two [redistricting] plans will elect more minority-preferred candidates" because they will have to exercise "political judgment[]." IR Br. in Opp. at 20, 21. But Congress wanted district courts to conduct a "searching practical evaluation of 'the past and present reality'" to determine whether Section 2 has been violated. *Gingles*, 478 U.S. at 45 (quoting S. Rep. No. 97-417, at 28-30). District courts already decide complex issues under Section 2, such as whether racial bloc voting exists, whether political cohesion is present, and whether the totality of the circumstances shows vote dilution. These issues inherently require political judgment. *See, e.g., Old Person v. Brown*, 312 F.3d 1036, 1052 (9th Cir. 2002) (Noonan, J., concurring) ("To be sure, judgment as to superiority or inferiority

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[7] Respondents cite the United States' amicus brief in *Voinovich* as supporting their position *prohibiting* ability-to-elect claims without acknowledging that the United States filed briefs in at least four other cases *supporting* ability-to-elect claims. Petition at 25-26 (listing briefs).

[of a minority-preferred candidate] would require a political judgment from the judge; but so do the other factors the judge is required to consider [under Section 2]."); *Westwego Citizens for Better Gov't v. Westwego*, 872 F.2d 1201, 1203 (5th Cir. 1989) (citations omitted) (Section 2 claims inherently "require[] close analysis of unusually complex factual patterns . . . [with] the potential for serious interference with state functions. . . .").

Moreover, this Court in *Georgia* required a district court in cases arising under Section 5 of the Act to measure the impact of ability-to-elect districts on the ability of minorities to "effectively exercise" the "electoral franchise." *See* 539 U.S. at 479-80. To perform this task requires the same pragmatic, fact-sensitive judicial skills that are necessary to determine under Section 2 of the Act whether a less-than-50% minority group has the ability to elect its candidate of choice. *See id.* at 479-80 (majority op.), 485-90 (Souter, J., dissenting). Respondents' distrust of the capabilities of district courts is unwarranted.

C. This Case Is An Ideal Vehicle To Demonstrate That Ability-To-Elect District Claims Are Necessary To Combat Vote Dilution.

1. Ability-to-elect district claims are necessary to fight real dangers to minority group members' ability to participate as equals in American political life. Here, Petitioners allege that African-American voting strength was diluted when, in drawing Congressional districts in 2001, the Commonwealth Respondents "packed" certain African-Americans in one district and "cracked" a nearby African-American population into two other districts. Packing and cracking have long been recognized as techniques that dilute minority voting strength. *Voinovich,* 507 U.S. at 153-54.

Under the new district lines, African-Americans have the potential to elect a candidate of choice in only the "packed" Congressional district. *See* App. at 49a, 51a, 53a. That means that they likely can elect a candidate of choice in only 1 of Virginia's 11 Congressional districts (9%), even

though African-Americans are approximately 20% of Virginia's population. *Compare* http://dlsgis.state.va.us/congress/HB18Enrolled/HB18Enrolled.htm with http://www.census.gov/census2000/states/va.html. This large disproportionality is some evidence – not conclusive evidence, but some evidence – of unequal political and electoral opportunity. *De Grandy*, 512 U.S. at 1025 (O'Connor, J. concurring) ("Lack of proportionality is probative evidence of vote dilution.").

2. Permitting ability-to-elect claims does not create a "virtually irrebuttable mandate for proportional representation." *Cf.* IR Br. in Opp. at 12, 25-26. To start with, Petitioners' position does not eliminate the first *Gingles* prong, as Respondents claim. Like a standing requirement, the first *Gingles* prong ensures that minority voters suffered actual harm from the challenged electoral structure and that a remedy is available. *See Growe v. Emison*, 507 U.S. 25, 28 (1993). For ability-to-elect district claims, plaintiffs must show that they lost their ability to elect a candidate of their choice (harm) and that an alternative plan would give them the ability to elect their candidate of choice (remedy). Minority group plaintiffs who bring ability-to-elect claims must prove their ability to elect through statistical evidence, expert analysis, and "other political and demographic facts."[8] *Georgia*, 539 U.S. at 493 (Souter, J., dissenting). Respondents ignore how difficult it would be for plaintiffs to make these showings to avoid summary judgment or at trial.

And plaintiffs must still prove the other two *Gingles* factors and that, in the totality of circumstances, they do not have an equal opportunity to participate in the electoral process and elect their candidate of choice. Making

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[8] Respondents complain that because Petitioners did not specifically allege every fact affecting their ability to elect a candidate of their choice, or that they lacked full political opportunity, this case is a "poor vehicle" to address Petitioners' claims. IR Br. in Opp. at 13, 15. Yet both the Fourth Circuit and the district court dismissed Petitioners' complaint solely for failure to meet a rigid 50% standard supposedly required by the first *Gingles* prong, not for any other claimed deficiency.

these showings is also difficult. There are cases where minority group plaintiffs have proven the three *Gingles* factors, yet the district court found no Section 2 violation because the totality of the circumstances weighed against the plaintiffs. *See, e.g., Old Person*, 312 F.3d at 1049-50; *NAACP v. Fordice*, 252 F.3d 361, 373-74 (5th Cir. 2001). Whatever "mandate" Respondents believe might exist is not "virtually irrebuttable."

In any event, this Court made plain in *De Grandy* that "proportionality"[9] (the relationship between the number of districts where a minority group has the ability to elect and the minority's group's population share) is not an improper goal. *See* 512 U.S. at 1020. Respondents' seeming criticism of this "rough proportionality," *see* IR Br. in Opp. at 27, is unfounded.

3. Respondents suggest that the first *Gingles* prong be interpreted rigidly to avoid "penalizing" jurisdictions where voting is less racially polarized. IR Br. in Opp. at 24. Their implicit assumption is that vote dilution can only be found where there is *no* white crossover voting at all. *Gingles* shows this argument is wrong. *See* 478 U.S. at 59 (finding vote dilution where white crossover voting for African-American candidates ranged from 8% to 50% in primary elections and from 28% to 49% in general elections). "Lower courts reviewing Section 2 claims have generally concluded, however, that a small but consistent amount of crossover voting does not defeat a finding of racially polarized or bloc voting." *Valdespino* Amicus Br., *supra*, at 12 n.3 (citing numerous Circuit cases).

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[9] This is different from "proportional representation," which is the relationship of the number of elected minority representatives to the minority group's population share. *See De Grandy*, 512 U.S. at 1014 n.11. Respondents' use of this term to describe the supposed result of ability-to-elect district claims is highly misleading. Petitioners do not seek proportional representation. Even by Respondents' flawed reasoning, ability-to-elect claims would result in proportionality, not "proportional representation."

Moreover, allowing plaintiffs whose voting strength is diluted to bring a claim even if they constitute less than an arithmetical majority in a district would not subvert the interests of one minority group to another. That was not the case in the First Circuit case of *Metts*,[10] and it was not the case here. In both cases, the plaintiffs sought to avoid illegal vote dilution by demonstrating that an alternative districting plan would give them an opportunity to participate fully in the political process and elect their candidate of choice. They were not seeking a "trade-off" between competing minority groups.

CONCLUSION

For the reasons set forth above and in the petition for a writ of *certiorari*, the petition should be granted.

Respectfully submitted,

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[10] Respondents claim Hispanics were hurt by the settlement in the First Circuit *Metts* case of the ability-to-elect claim brought by African-Americans. IR Br. in Opp. at 22. But before the settlement, one Hispanic state senator (Juan Pichardo) had been elected in 2002. After the settlement, Senator Pichardo was reelected in 2004, and an African-American state senator (Harold Metts) was also elected in 2004. *Compare* http://www.elections.ri.gov/2002GE/RIsenatetotals.htm *with* http://www.elections.ri.gov/2004GE/SenateDis2.htm, http://www.elections.ri.gov/2004GE/SenateDis6.htm. Hispanics were not harmed by the *Metts* plaintiffs' ability-to-elect claim.